

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
TERRA WORKS, INC., and
ANTHONY J. SINGLETON, FIRE
CHIEF, and CITY OF ISSAQUAH,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB Nos. 86-40 and 86-42

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, two appeals of a notice and order of civil penalty for allowing an outdoor land clearing fire without all necessary permits and accomplishing demolition, came on for hearing before the Board; Lawrence J. Faulk, Wick Dufford, and Gayle Rothrock (presiding) at Lacey on June 6, 1986. Respondents, pursuant RCW 43.21B.230, requested a formal hearing and the matter was officially reported by Lisa Flechtner.

Appellant Terra Works, Inc., appeared and was represented by its

1 president, Rod Churchill. Appellant Singleton and City of Issaquah
2 failed to appear. Respondent public agency Puget Sound Air Pollution
3 Control Agency appeared and was represented by its attorney Keith D.
4 McGoffin.

5 Witnesses were sworn and testified. Exhibits were admitted and
6 examined. Argument was heard. A motion was made to dismiss the
7 appeal of City of Issaquah and A. J. Singleton for failure to appear
8 and prosecute their appeal. The Board took the motion under
9 advisement. Appellants having never appeared during the hearing, and
10 the record showing no reason for their not appearing, the Board grants
11 the motion.

12 From the testimony, evidence, and contentions of the parties the
13 Board makes these

14 FINDINGS OF FACT

15 I

16 The Puget Sound Air Pollution Control Agency (PSAPCA) is an
17 activated air pollution control authority under terms of the state's
18 Clean Air Act, empowered to monitor and enforce outdoor open burning
19 codes in a five-county area of mid-Puget Sound.

20 The agency has filed with the Board a certified copy of its
21 Regulation I, and all amendments thereto, of which we take judicial
22 notice.

23 II

24 Terra Works, Inc., is land clearing, excavation, road building,
25 and gravel handling firm in King County. The firm has been in

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1 business two years and has previously done work for the City of
2 Issaquah.

3 On December 31, 1985, while on routine patrol, an inspector
4 observed a large amount of opaque smoke just off the Renton-Issaquah
5 Road. A land clearing fire was noted which, upon closer inspection,
6 appeared to contain demolition materials, including sheet metal, wire
7 cables, plywood, lumber scraps, and dirty straw.

8 When arriving on site the inspector came in contact with two
9 officials of Terra Works, Inc., and advised them the fire contained
10 prohibited material and that his attention was drawn to the smoke.

11 IV

12 Terra Works was able to produce a burning permit issued for the
13 site by the City of Issaquah. The City had arranged a contract with
14 the company for site clearing, which contract indicated that Issaquah
15 was responsible for providing all pertinent permits. Terra Works was
16 not able to show a Population Density Verification (PDV) issued by
17 PSAPCA to either Issaquah or themselves.

18 V

19 The demolition materials in the fire came from an old shed or barn
20 Terra Works had stripped and prepared for disposal. That morning the
21 Issaquah Fire Chief had authorized Terra Works to burn the remains of
22 the old shed.

23 VI

24 Terra Works thought their land clearing operation was occurring on
25 city-owned land. In fact, the property is owned by a private party

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1 | who had granted an easement to Issaquah through that property to
2 | construct a water supply facility. Nonetheless, all the work involved
3 | in the site clearing project was done for the city and pursuant to its
4 | direction.

5 | VII

6 | The PSAPCA inspector took photos of the fire and left a copy of
7 | the open burning regulations (PSAPCA's Regulation I, Article 8) with
8 | Terra Works personnel.

9 | Respondent Agency's inspector indicated that the burning on
10 | December 31, 1985, was in violation of air pollution regulations on
11 | three counts: (1) burning prohibited materials, (2) burning for
12 | purposes of demolition, and (3) no population density verification
13 | (PDV) in their possession. Appellant Terra Works indicated they would
14 | immediately quit burning and arrange to apply for a PDV through
15 | Issaquah and PSAPCA. They did both these things and, eventually,
16 | completed the land clearing burning after a PDV was obtained.

17 | VIII

18 | On January 4, 1986, the two appellants and one property owner in
19 | these matters, received notices of violation for three violations of
20 | PSAPCA's Regulation I, Article 8.

21 | On February 14 1986, PSAPCA issued to Terra Works, Inc., and City
22 | of Issaquah Notice and Order of Civil Penalty, Amended #6406 and
23 | Revised #6411, citing three violations and levying a \$500 penalty.

24 | From this appellant Terra Works appealed to the Board for relief
25 | on February 27, 1986. City of Issaquah appealed to the Board for

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1 relief on March 5, 1986.

2 IX

3 Any Conclusions of Law which is deemed a Finding of Fact is hereby
4 adopted as such.

5 From these Findings of Fact the Board comes to these

6 CONCLUSIONS OF LAW

7 I

8 The Board has jurisdiction over these persons and these matters.
9 Chapters 43.21B and 70.94 RCW.

10 II

11 On December 31, 1985, an open land clearing fire was allowed to
12 become a smokey multi-purpose fire, disposing of prohibited materials,
13 at least partly attributable to demolition of an old wooden shed.
14 This occurred in violation of regulations of PSAPCA, as provided here;

15 it shall be unlawful...to cause or allow an outdoor
16 fire containing garbage, dead animals, asphalt,
17 petroleum products, paints, rubber products,
18 plastics, or a substance other than natural
19 vegetation which normally emits dense smoke or
20 obnoxious odors. Regulation I, Section 8.02(3).

21 it shall be unlawful to...cause or allow an outdoor
22 fire for the purpose of demolition, salvage, or
23 reclamation of materials. Regulation I, Section
24 8.02(4)

25 III

26 On December 31, 1985, appellants did conduct a land clearing burn
27 in an urbanized area without PSAPCA's having provided a formal
28 verification that the population in the immediate area was not too
29 dense for such a burn to take place safely.

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1 This circumstance violates PSAPCA's Regulation I, Section 8.06(3)
2 as noted:

3 it shall be unlawful to...cause or allow an outdoor
4 fire for land clearing burning within an urbanized
5 area, as defined by the U. S. Bureau of the Census,
6 without the Agency having verified that the average
7 population density within 0.6 miles of the burning
8 site is 2,500 persons per square mile or less.

9 IV

8 Terra Works was working for the City of Issaquah and proceeded
9 under the City's directions. But, the burning itself was the act of
10 Terra Works.

11 The burning of demolition materials and prohibited materials is
12 banned outright. PSAPCA issues no permit which would authorize such
13 burning. See RCW 70.94.775. Therefore, any contractual obligation of
14 the City to get burning permits is irrelevant to these offenses.
15 Moreover, we decline to allow the "I was only following orders"
16 defense to operate to shield Terra Works from responsibility for
17 prohibited acts.

18 However, the land clearing burning without a PDV stands on a
19 different footing. As it turned out, the population in the area was,
20 in fact, sufficiently sparse for land clearing burning to be validly
21 conducted. Thus, the violation was of only the administrative
22 requirement to verify this in advance. This obligation was assumed by
23 the City in its contract with Terra Works. We do not believe that, in
24 this penalty context, Terra Works should have to bear the burden of
25 the City's failure to perform. Under the circumstances, we conclude

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1 that it was Issaquah and not Terra Works that did "cause or allow" a
2 land clearing fire without the agency having verified population
3 density. If the problem were the lack of a discretionary permit, we
4 would have a difference case.

5 V

6 The civil penalty is reasonable in amount and is well within the
7 limits of those penalty standards set forth in Regulation I and in
8 Chapter 70.94 RCW.

9 Normally when several parties are charged with several violations
10 underlying a civil penalty, if any violations are found, all persons
11 charged are found responsible for all violations asserted and each
12 responsible entity becomes liable for the entire penalty. Usually
13 this occurs through application of conventional principles of
14 respondeat superior.

15 Here, however, we have the highly unusual situation of one of the
16 entities charged being absolved of one, but not all, of the violations
17 asserted. In order to do justice, in this situation we believe that
18 Terra Works' liability must be limited to an amount proportionate to
19 its proper responsibility for the wrongs alleged.

20 VI

21 Any Finding of Fact which is deemed a Conclusion of Law is hereby
22 adopted as such.

23 From these Conclusions of Law the Board enters this
24
25

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ORDER

The appeals of the City of Issaquah and Anthony J. Singleton are dismissed. Notice and Order of Civil Penalty No. 6411 is affirmed; provided, however, Terra Works, Inc., is liable for one third only of the amount.

DONE this 24th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Vice Chairman

 6/24/86
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member